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INFO RUEHSO/AMCONSUL SAO PAULO 6428
RUEHRI/AMCONSUL RIO DE JANEIRO 1579
RUEHRG/AMCONSUL RECIFE 4374
RUEHMN/AMEMBASSY MONTEVIDEO 6077
RUEHBU/AMEMBASSY BUENOS AIRES 3817
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UNCLAS SECTION 01 OF 03 BRASILIA 000367

SIPDIS

DEPT FOR EB/IPE CLACROSSE AND ANNA MARIA ADAMO
DEPT PLS PASS TO USTR JCHOE-GROVES
DOC FOR JBOGER
DOC PLEASE PASS TO USPTO JURBAN AND LOC STEPP

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SIPDIS

E.O. 12958: N/A
TAGS: [KIPR](#) [ETRD](#) [ECON](#) [BR](#)
SUBJECT: BRAZIL'S SPECIAL 301 RECOMMENDATION

REF: (A) STATE 14937, (B) 05 Brasilia 2813 (Notal), (C) 05 Brasilia 2729, (D) Brasilia 271, (E) 05 Brasilia 1163

11. (U) Per ref A, the following is Embassy Brasilia's input for the Special 301 Review of Brazil.

12. (SBU) Summary. Brazil made significant strides last year in improving the protection of copyrights and intellectual property related to biotechnology - key areas of concern in previous Special 301 submissions. On January 16, 2006 the USG terminated review of Brazil's trade benefits under the Generalized System of Preferences based on advances made by Brazil on copyright enforcement. Meanwhile, passage of Brazil's Biosafety Law eliminated barriers to the protection of biotech-related IPR. If we were to base our judgment solely on these considerations, post would recommend that Brazil be moved from the Priority Watch List to the Watch List. However, Brazil's overall performance in defending intellectual property rights remains uneven, particularly in the area of patents. Specifically, at this time negotiations are on-going -- under the threat of compulsory licensing -- between Brazil's Ministry of Health and two U.S. pharmaceutical companies over pricing of anti-retroviral (ARV) AIDS drugs. Therefore, Post's recommendation is that Brazil stay on the Priority Watch List, but be downgraded to the Watch List if these negotiations reach a mutually satisfactory conclusion prior to the Special 301 announcement. Should Brazil remain on the Priority Watch List, the GOB would likely react, claiming that this decision demonstrates USG refusal to acknowledge Brazil's improved performance on copyright protection. However, privately, our main GOB interlocutors on IPR would understand the reason for our decision. End Summary.

Copyright -- Cooperation

13. (SBU) On January 13, 2006 the USG announced its decision to close a review of Brazil's trade benefits under the Generalized System of Preferences. Brazil's GSP benefits had been threatened by a petition filed by the International Intellectual Property Alliance in 2000 alleging ineffective copyright protection. The GSP Review decision was based on advances made in copyright enforcement by Brazil in 2005, including formation of the public-private sector National Council to Combat Piracy and Other IP Crimes (CNCP), establishment of (and progress in implementing) a national anti-piracy action plan, and a significant increase in law enforcement actions, most notably along the border with Paraguay and in local marketplaces. (See ref B for a detailed survey of Brazil's actions through October 2005). The CNCP has been successful in

encouraging the formation of anti-piracy task forces in a number of municipalities and formation of counterpart state-level anti-piracy councils in Rio Grande do Sul and most recently in Sao Paulo, thus further improving its organizational capabilities for combating piracy.

¶4. (SBU) In 2005, Brazilian federal law enforcement agencies seized pirated goods valued at around US\$84 million, a 130 percent increase over 2004. Efforts were directed mainly at stemming the tide of illicit merchandise entering the country, primarily across the Brazil-Paraguay border at Foz do Iguacu. Operation Cataratas in Foz yielded seizures valued at around US\$60 million over the 12 months of last year. Brazil's customs service reported seizures of 10.3 million CDs and DVDs in Foz alone, 96 percent of which were virgin discs; this is almost three times the amount seized in 2004. A number of other major operations (Muralha, Porto de Santos, Plata, Rezende-RJ) were conducted throughout the country.

¶5. (SBU) During the year-end holiday, the GoB expanded its focus by launching raids directed at the retail level in a number of cities and states. Operation Sagitarius, which involved over 1500 police and customs agents, raided huge, well-known market places in Sao Paulo -- i.e., Stand Center, Shopping Marco 25, and Promocenter -- apprehending an estimated US\$5 million in pirated goods. Sales in these markets were estimated to have dropped by as much as US\$250 million for the month. Acknowledging that the affect on sales of pirated products from such raids is temporary, local customs and fiscal officials have pledged continued actions. In early 2006, the momentum has continued. In one operation alone in the poor northeastern state of Piaui in January, over 1.7 million CDs and DVDs and 8 tons of other merchandise were seized.

¶6. (SBU) Brazil's judicial system remains a weak link in the fight

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against piracy. Last year was the first time that a copyright pirate has been sent to jail. Indeed, in 2005 only 14 people were convicted of piracy related crimes. In 2003, the GOB enacted tougher sentences for piracy but the effects may not be apparent until 2008 as cases take an average of five years to work through the system. The CNCP acknowledges the problem, which in large part reflects systemic problems of inefficiency and poor quality in the country's judiciary system, and is seeking ways to ameliorate it through education and judicial specialization.

¶7. (SBU) Recognizing the GoB's new commitment to fighting piracy, but also the need for continued effort, the International Intellectual Property Alliance (IIPA) recommended that Brazil be moved from the Priority Watch List to the Watch List. And if Brazil comes to a satisfactory negotiated solution with the U.S. pharmaceutical makers at risk (see paragraph 13), we would support this recommendation. Indeed, we would go even further and dispense with the out-of-cycle review also recommended by IIPA, as this might distract Brazil from substantive anti-piracy efforts while shifting the focus onto the more political and contentious aspects of our bilateral dialog on this issue. Brazil appears committed to fighting piracy due to domestic interests, such as concern over organized crime, lost tax revenues and the high level of informality it promotes in the economy. But given the size of the country and the level of entrenched piracy, substantial improvement will require a forceful and sustained effort over a number of years.

¶8. (SBU) Note, while Nintendo's arguments that Brazil's high tariffs and taxes suppress the market for its products are valid, these represent bad domestic policy choices by Brazil rather than discriminatory behavior -- the tariffs are below Brazil's WTO bound rate and the country's costly and complex tax structure is the bane of domestic producers and importers alike.

Biotechnology - A Legal Framework At Last

¶9. (SBU) After years of refusing to acknowledge the significant extent of illegal biotech soybean seed use in the country, Brazil established a legal framework for the use of biotech agricultural products through the Biosafety Law (11,105/2005), signed by

President Lula on March 24, 2005. This law, which also includes provisions for stem cell research, became effective on March 28, 2005 after its publication in Brazil's official registry (Diario Oficial). Implementing regulations for the law were issued by presidential decree on November 23, 2005. Law 11,105 has improved the quality of public debate on biotechnology in Brazil and provided a frame of reference for judicial proceedings. While outstanding issues remain, movement has been in the right direction, driven by Brazil's own substantial commercial interest in biotechnology. None of the 2006 Special 301 submissions for Brazil raised concerns in the area of biotechnology.

Patents - Uncertainty

¶10. (SBU) Unfortunately, in the area of patents a level of common interest is much less apparent. In particular, the Ministry of Health's threat to issue compulsory licenses for certain ARVs for AIDS treatment casts a shadow over our bilateral IPR dialog (ref C).

We have been told that negotiations between the Ministry of Health and Gilead Sciences, and Merck, Sharp and Dohme are going smoothly, but the longer it takes to conclude agreements, the more opportunity there is for trouble. For instance, should the Health Minister resign in order to run for elective office (by law, he would have to do so by March 31), the negotiations could go back to square one, or worse, a new Minister could take the politically expedient route of announcing a decision to issue compulsory licenses, without resuming negotiations with the companies.

¶11. (SBU) As noted in Pharma's Special 301 submission, Brazil's industrial property law (Law 9,279/1996), as amended, also contains some problematic provisions. One prohibits importation as a means of satisfying the requirement that a patent be "worked" in Brazil. This issue was the subject of a U.S. dispute settlement proceeding at the WTO, which was terminated without prejudice in June 2001. Another requires prior approval by Brazil's health agency, ANVISA, before issuance of a patent. These issues have been the subject of USG-GoB discussions, as have been allegations of disclosure of proprietary information, which ANVISA denies.

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¶12. (SBU) Pharma also notes concern over pending legislation (Bill 22/2003 - unpatentability of AIDS drugs) that would clearly be WTO-inconsistent. However, this measure and other troubling patent-related bills have not been enacted into law. Activists both outside and inside the government may find it politically advantageous to promote such projects, but high-level government officials have not embraced the legislation and the implications of Bill 22's passage have not been lost on our Foreign Ministry interlocutors.

¶13. (SBU) According to Interfarma, the local association of international pharmaceutical companies, the biggest problem for their industry is really that patent issuance is just plain slow (ref D). Last year the National Patent and Trademark Institute (INPI) was able to slightly reduce patent and trademark application backlogs - currently at 130,000 (17,000 for pharmaceuticals) and 500,000 respectively - but it will take years to eliminate them. INPI has had to fight a number of bureaucratic battles for increased resources, although it may now be poised for a substantial overhaul.

The Institute has secured an increased budget and in early 2006 is in the process of hiring an additional 145 examiners. Separately it has received authorization to hire an additional 400 examiners over a several year period. INPI has approached Mission requesting the resumption of a dialog with USPTO on technical assistance. Post supports a closer working relationship, including training, between USPTO and INPI, as this will provide a vehicle for improving Brazil's patent and trademark adjudication as well as an avenue for discussing policy issues that affect Brazil's domestic IPR policies and its positions in international IPR fora.

Post's Special 301 Recommendation

¶14. (SBU) Brazil Special's 301 status should reflect the positive

developments it has made in copyright enforcement, but also the need for continued improvements, both in combating piracy and in its patent regime. Accordingly, Post recommends that Brazil remain on the Priority Watch List, but be downgraded to Watch List if the negotiations over ARV pricing/compulsory licensing reach a mutually satisfactory conclusion prior to the Special 301 announcement. Publicly Brazil will react negatively to the "status quo" option, claiming the USG refuses to acknowledge Brazil's improved performance on copyright protection. However, privately, GOB interlocutors would understand the reason for our decision.

Training

¶15. (SBU) The high profile given over the last year to the government's anti-piracy activities has increased interest within Brazil's law enforcement and customs agencies in anti-piracy training. Post seeks to send Brazilian officials to training opportunities as they arise, such as ILEA IPR Enforcement Academy training (February 2006) and USPTO Enforcement Academy offerings. This year Post is also offering anti-piracy training in partnership with a local copyright defense association; the INL-funded program will consist of 5 sessions held throughout the country, with a total of 200 participants (ref E). Post encourages USPTO to consider opportunities for training/technical assistance for INPI's cadre of new examiners. Such training would yield immediate benefits in the speed and quality of patent and trademark adjudications in Brazil, but also serve as an opportunity to present to this group the U.S. perspective on policies relating to patents and trademarks which could yield significant returns over the longer-term.

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